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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* WC Docket No. 05-25; RM-10593

Dear Ms. Dortch:

In its recent Report and Order, the Commission took the first step in addressing longstanding problems with the rules governing special access.[1] The Commission's decision to suspend its pricing flexibility triggers was based on "compelling evidence" that the existing rules were not working as the Commission had intended.[2] Nonetheless, the Commission indicated that it would issue a third request seeking additional data about the special access marketplace before it finally adopted an order overhauling its special access rules.[3] Although Sprint believes that the Commission already has a sufficient record to conduct the necessary market analysis and establish a new pricing flexibility framework, it is committed to providing the Commission with any additional data the Commission believes it needs to conclude this proceeding and ensure that special access rates, terms and conditions are just and reasonable throughout the United States.

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1 *Special Access for Price Cap Local Exchange Carriers,* WC Docket No. 05-25, Report and Order, FCC 12-92 (rel. Aug. 22, 2012) ("*Special Access Relief Order*").

2 *Special Access Relief Order* ¶ 3; *see also id.* ¶ 5 ("[b]ased on the evidence in the record and thirteen years of experience . . . we now conclude that the Commission's existing collocation triggers are a poor proxy for the presence of competition sufficient to constrain special access prices or deter anticompetitive practices . . . ."); *compare* Letter from Frank S. Simone, AT&T, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 1 (Sept. 25, 2012) ("AT&T Letter") (claiming that the FCC suspended the pricing flexibility triggers "on the basis of what the Commission admits is an inadequate record").

3 *Special Access Relief Order* ¶ 7.

Sprint also recognizes, however, that responding to a detailed data request may be difficult for small carriers that offer little if any special access service.[4] Accordingly, Sprint supports the adoption of a *de minimis* exception that would exempt carriers with networks that connect to fewer than a Commission-specified number of buildings in a particular geographic market from providing data about their offerings in that market.[5]

AT&T, on the other hand, opposes the adoption of any *de minimis* exception, no matter how narrowly tailored.[6] Essentially, AT&T speculates that collecting data from the smallest providers will somehow expose a previously hidden universe of *de minimis* providers whose combined networks reach significant numbers of buildings in various geographic markets.[7]

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[4] *See, e.g.,* Letter from Genevieve Morelli, ITTA President, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 1 (Oct. 1, 2012) (explaining that the "systems and databases employed by smaller carriers may not provide for data to be reported in the precise manner or format the Commission outlines in its data request."); The Office of Advocacy of the U.S. Small Business Administration, *President Obama Issues Executive Order on Improving Regulation and Regulatory Review*, *available at*: <http://www.mbda.gov/node/651> (last visited Oct. 5, 2012) (noting that small businesses "spend 36 percent more than larger firms to comply with federal regulations").

[5] *See, e.g.*, Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (Aug. 15, 2012) (supporting the application of a *de minimis* standard in determining who must respond to the expected mandatory data request); Letter from Tamar E. Finn, Counsel to TDS Metrocom, LLC, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (Aug. 27, 2012) ("TDS Metrocom Letter") (explaining how a *de minimis* exception to a mandatory data request "could ease the burden on small companies . . . who are not significant providers of on-net connections or significant purchasers of special access services").

[6] AT&T blithely dismisses the concerns that small providers have raised about an extensive data request, arguing that those providers already have the information needed to respond. *Compare* AT&T Letter at 4-5 *with* TDS Metrocom Letter (explaining that answering the Commission's questions could require it to "expend significant resources to review multiple data sources in order to compile" a response). This argument ignores small providers' explanations that they are likely to expend a fair amount of time and effort in order to gather the information the Commission seeks and translate it into a format that is responsive to the Commission's questions. *See, e.g.,* Letter from Thomas Cohen, Counsel to American Cable Association, to Marlene Dortch, FCC Secretary, WC Docket No. 05-25, at 2 (Sept. 24, 2012) (noting that ACA members often "have no commercial reason to maintain special access data . . . [or] keep it in formats easily accessible and similar to that of incumbent carriers"). There is no point in imposing these costs on *de minimis* providers that, by definition, provide only a minimal amount of service and are not significant players in the special access marketplace.

[7] *See* AT&T Letter at 2.

AT&T's speculation is unfounded, however, and ignores the plain realities of the marketplace, as well as the extensive evidence already gathered in this proceeding.[8]

Given that the incumbent LECs provide hundreds of millions of special access lines[9] generating between ten and twenty billion dollars in annual revenues,[10] it would be nearly impossible for *de minimis* providers to offer a sufficient number of connections to materially affect the Commission's analysis. In fact, the evidence already in the record establishes that the incumbent LECs control an overwhelming share of the relevant marketplace. In particular, the incumbent LECs control over 90% of the DS1 and DS3 channel terminations that are the focus of this proceeding.[11] No amount of data from *de minimis* providers will have a significant impact on those numbers.[12]

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[8] AT&T's arguments also fly in the face of government efforts to reduce regulatory burdens on small businesses. *See, e.g.*, Paperwork Reduction Act, 44 U.S.C. §§ 3501, *et seq* . Indeed, the Commission has long recognized the usefulness of *de minimis* exceptions in reducing burdens on small providers. For example, in the universal service context, the Commission has adopted a *de minimis* exemption for any provider whose contribution to the Universal Service Fund is less than $10,000. 47 C.F.R. § 54.708.

[9] *See* Stephen E. Siwek, Economists Incorporated, *Economic Benefits of Special Access Price Reductions*, at 6 & n.10 (March 2011), *available at*: <http://www.mediaaccess.org/uploads/EIReport.pdf > ("EI Report"), citing the Statistics of Communications Common Carriers, 2006/2007 Edition (noting that incumbent LECs had provided over 300 million digital special access lines in 2007 and nearly 700 million additional analog special access lines); *see also id.* at 7 (noting that in the years leading up to 2007 – the last year for which ARMIS data are available – the number of special access lines "grew rapidly").

[10] *See, e.g.,* EI Report at 7; *see also Special Access Relief Order* ¶ 2 (estimating that the four largest incumbent LECs had revenues of over $12 billion from the sale of DS1s and DS3s in 2010 alone).

[11] *See, e.g.,* EI Report at 7. A preliminary analysis of the information submitted in response to the Commission's prior data requests issued in this proceeding shows that little has changed since the data underlying the EI Report was collected. The incumbent LECs continue to control the connections to the overwhelming number (well over 90%) of locations and earn a correspondingly overwhelming share of special access revenues.

[12] The analogy to universal service is an apt one. It is conceivable that there could be thousands of carriers whose contributions would be just below the $10,000 threshold for being considered *de minimis*. The aggregation of all those *de minimis* contributions could potentially amount to tens of millions of dollars. Yet, even that amount is insignificant in relation to the multi-billion dollar Universal Service Fund. Thus, the Commission has retained the *de minimis* exemption for universal service contributors. Similarly, even if AT&T's worst case scenario played out and there were dozens of *de minimis* providers in particular markets, all serving

AT&T's arguments are also premature, given that the Commission has yet to establish the threshold for determining whether a carrier should be deemed a *de minimis* provider. The Commission can craft the *de minimis* exception in a way that will ensure that the exception will not have a material effect on the analysis. In addition, the data the Commission collects from special access purchasers will provide a means of checking on *de minimis* providers' presence in a market, as the services purchased from those providers will be reflected in the responses submitted by special access customers.[13] The Commission can also require providers claiming the *de minimis* exception to file responses indicating the markets where they provide facilities-based connections, but do not meet the threshold. This will allow the Commission to track the number of *de minimis* providers in any given geographic market. If a market has a particularly large number of *de minimis* providers, the Commission can take that fact into account in analyzing the competitiveness of that market.

Although AT&T's *ex parte* letter relies heavily on GeoTel data, AT&T does not provide citations to the information it depends on – a curious omission for a party that places such a high premium on the completeness of the data in the record. Nor does AT&T provide any explanation for its analysis of the information it apparently has acquired from GeoTel. Thus, it is virtually impossible to provide meaningful comment on AT&T's seemingly improbable assertion that "exempting CLECs with 10 or fewer buildings would exclude, on average, about 200 CLEC-connected buildings in each market,"[14] other than to note this would require there to be at least 20 *de minimis* providers in each market, with no overlap between the buildings served by each provider. Even assuming that AT&T's assertions are correct, 200 buildings represents only a small fraction of all locations with special access demand in a typical metropolitan area.[15]

Even more damaging to AT&T's argument is its admission that the GeoTel data apparently do not distinguish between connections using leased facilities and "on-net" connections provided over the carrier's own network.[16] Only the latter set of connections is relevant to the Commission's analysis.[17] Accordingly, the Commission's data request should not

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unique locations, the sum of all the locations served by the exempt providers would be dwarfed by the number of locations served by the incumbent LECs.

[13] By taking a "belt and suspenders" approach and collecting data from both purchasers and providers, the Commission is certain to capture all the data it need to conduct its analysis.

[14] AT&T Letter at 2.

[15] *See, e.g.*, *id* at 2.

[16] *Id.* (admitting that the GeoTel data may include connections provided over leased facilities).

[17] Connections provided over leased or resold lines should not be counted in determining whether a provider is eligible for the *de minimis* exemption. Only connections provided over a carrier's own facilities are relevant in determining whether there is meaningful competition for special access services. *See, e.g., Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion

encompass services provided on a resale basis. Indeed, carriers that act purely as resellers, and do not offer any facilities-based special access services, should be able to respond to the Commission's data request simply by certifying that they are resellers.

AT&T also places great importance on "near network" buildings that it alleges are "capable" of being served by small carriers.[18] It would be a mistake, however, to assume that competitive carriers can connect to a building simply because it is "near" their fiber networks.[19] As DoJ has found, a building with only DSn levels of demand must be within approximately 500 feet of a competitive carrier's network before it is economic for the carrier to extend its facilities into that building.[20] Thus, AT&T's concern with "fiber miles"[21] seems misplaced, as there is no evidence that the networks that are made up of these "fiber miles" can be extended economically to buildings or other locations that are currently unserved by competitive carriers.[22]

Similarly, AT&T's letter ignores the fact that concerns about the special access marketplace are not focused on the small handful of buildings that generate sufficient demand to

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and Order, 25 FCC Rcd 8622, ¶¶ 71, 99 (2010), *aff'd sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) (examining network coverage by facilities-based competitors); *see also AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 29 (2007) ("*AT&T-BellSouth Merger Order*") (defining "'Type I' special access services, which are offered wholly over a carrier's own facilities," as a separate relevant product market from "'Type II' special access services, which are offered using a combination of the carrier's own facilities . . . and the special access services of another carrier").

[18] AT&T Letter at 4.

[19] *See, e.g.*, Declaration of Bridger M. Mitchell and John R. Woodbury, Attachment 1 to Reply Comments of Nextel Corporation, WC Docket No. 05-25, at 29-30 (July 29, 2005) (explaining why the incumbent LECs' claims about proximity to competitive fiber are misleading); *see also* Declaration of Steven Sachs, Attachment 2 to Reply Comments of Nextel Corporation, WC Docket No. 05-25, at 4-5 (July 29, 2005) (discussing the considerations, including costs, involved in deciding whether to build a DS1 connection from an existing fiber ring to a new location).

[20] *See* United States' Notice of Public Filing of Redacted Submission, Redacted Declaration of W. Robert Majure, at 11 n.17, *United States v. SBC Commc'ns, Inc.*, No. 1:05-cv-02102 (D.D.C. Aug. 9, 2006) (positing that it would be uneconomic for a competitive carrier to extend its network even one tenth of a mile in order to serve a building with less than 2 DS3s worth of demand.).

[21] *See, e.g.*, AT&T Letter at 4.

[22] Although fiber miles may have some bearing on the transport marketplace, they are virtually irrelevant to the analysis of last-mile connections to buildings, which is the main focus of this proceeding. Moreover, AT&T's arguments about connections to buildings – and networks that are "near" buildings – ignores the need for connections to free-standing cell towers.

attract competitive providers and encourage the build out of competitive networks.[23] Rather, the problem is the lack of competitive alternatives for the vast majority of locations that require only a small number of DSn circuits.[24] Moreover, the incumbent LECs' unique ability to connect to virtually every building in their home territories provides them with a decided – often insurmountable – advantage over their competitors. A customer seeking connections to hundreds of locations in a geographic area would prefer to enter into a contract with a single provider that can reach all of those locations, rather than contracting with dozens of providers, each of which can reach a small number of locations. Thus, the reach of the incumbent LECs' networks provides them with an overwhelming advantage over newer entrants that cannot match the scope of the incumbents' networks.

Finally, AT&T's concern that a *de minimis* exception would fail to capture a large, well-funded provider that has just entered a particular geographic market and is committed to build its own network in that market is both highly speculative and at odds with AT&T's own characterization of the special access marketplace.[25] The DSn connections that are the focus of this proceeding have existed for decades and the market for these services is fairly mature. AT&T points to no new developments that would somehow cause a new competitor to enter the marketplace now or in the near future in order to meet the demand for DSn-level connections. Thus, AT&T's claims about "forward-looking market dynamics" are unfounded. These claims are also inconsistent with AT&T's assertions that that DSn services are "going the way of the dodo."[26] No major company is going to invest the vast resources needed to build a network in order to offer services that, according to AT&T, are on the verge of obsolescence.

Ultimately, AT&T's arguments about the importance of *de minimis* providers amount to little more than an attempt to impose unnecessary costs on its smallest competitors and to cast unreasonable doubts on any analysis the Commission conducts that is based on anything less than perfect information about the marketplace. Yet, the Commission has a long history of

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[23] AT&T Letter at 2 (admitting that competitors tend to concentrate on the largest buildings that generate a "disproportionately large amount" of special access demand). Presumably, locations that generate sufficient demand to encourage investment by *de minimis* providers will also attract larger providers, such as Sprint. Thus, the competition for high-demand locations will be reflected in the data submitted by providers that do not qualify for the *de minimis* exemption.

[24] *See, e.g.*, Letter from Colleen Boothby, Counsel to Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 3-5 (June 13, 2011) (explaining that the vast majority of buildings with special access demand require only DS1 capacity circuits and noting that DSn level circuits "are in fact the most common building blocks of corporate networks and will remain so for the foreseeable future"). Small businesses with only one or two DS1s worth of demand rarely, if ever, have a choice of vendors other than the incumbent LEC.

[25] AT&T Letter at 3.

[26] Comments of AT&T Inc., WC Docket No. 05-25, at 13 (Jan. 19, 2010).

exempting *de minimis* providers from unnecessary requirements.[27] Moreover, the Commission routinely has to make decisions based on the best available evidence.[28] Indeed, Sprint believes that the Commission has more than enough information to issue a decision in this proceeding without seeking any additional information.[29] Nonetheless, Sprint remains fully committed to providing the Commission with the additional data it requires to eliminate unwarranted grants of pricing flexibility and restore proper regulation of dominant carrier services in all relevant markets. There is no reason, however, to force *de minimis* providers to expend substantial resources to supply data that will have no effect on the Commission's analysis or on the outcome of this proceeding. Accordingly, Sprint urges the Commission to grant the requests of COMPTEL and others and adopt a *de minimis* exemption as part of its forthcoming mandatory data request.

Respectfully submitted.

/s/ Charles W. McKee
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[27] *See, e.g.*, 47 C.F.R. § 54.708; *2000 Biennial Regulatory Review; Amendment of Parts 43 and 63 of the Commission's Rules*, Report and Order, 17 FCC Rcd 11416, ¶ 30 (2002) (exempting CMRS carriers providing resale of international switched services from filing certain reports related to their service to foreign markets where they are affiliated with a foreign carrier with market power, based on a finding that "CMRS carriers have a *de minimis* amount of the switched resale international traffic and thus are unlikely to be able to distort traffic on affiliated routes").

[28] The Commission does not need to collect every possible iota of data in order to reach a reasonable conclusion. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009), citing *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("[s]ubstantial evidence does not require a complete factual record"); *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 252 (3d Cir. 2010), citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978) ("complete factual support in the record for the Commission's judgment or prediction is not possible or required").

[29] Certainly, the Commission has a more complete record now than it did when it issued the original *Pricing Flexibility Order*, for example. *See Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999). That order was based largely on speculation, yet AT&T was content to let the rules promulgated in that order remain in place for over a decade, even in the face of overwhelming record evidence that those rules were fundamentally flawed.